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No. 3687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

R. J. NELSON et al.,
Appellees.

BRIEF FOR APPELLEES.

H. W. HUTTON,
Proctor for Appellees.

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BRIEF FOR APPELLEES.

In this case the steam vessel City of Omaha, owned by the United States and engaged in the merchant service of the United States, left Norfolk, Virginia, bound to Japan via the Panama Canal. She was of the value of approximately $2,000,000.00 and her cargo was of the value of $606,475.00, making a total value of $2,606,475.00 (Trans. pages 24 and 25).

The wages of the *officers* and crew of the Cockaponset were $5.220.00 per month—not $5,220.00 per month—plus $375.50 and $155.00 as stated on page 2 of appellant's brief. The master is an officer. The total of all is $5,220.00. The purser is also an officer, and the language is "the *total* wages of the *officers*

and crew''—not the wages of the officers and crew exclusive of the captain and super-cargo.

The award for the officers and crew would, therefore, be the sum of $10,440.00, and, on the basis of 25% to the crew, would make a total award of $41,-760.00 for the whole service. That amount does not seem to be large, but on the contrary it seems to be small for a salvage service that occupied nearly seven days in performing and in which the vessel and property salved were towed 956 miles (Trans. page 60).

The City of Omaha was a new vessel; but it appears that she had boiler trouble, having first gone ashore in the Panama Canal and had her fore peak perforated, which was repaired. She subsequently put into Salina Cruz for repairs to her boilers, where she stayed 18 days, under repairs. She then left and her boilers began to trouble again, and went from bad to worse until she finally stopped altogether (Trans. page 55). She is ordinarily lighted by electricity and, when the boilers gave out, she had to light with oil lamps (Trans. page 57). Neither could she steer by steam, but had to steer by hand. That was very difficult as it caused the ship to steer wildly and caused the breaking of the tow line. It appears they had steam one day after the towing commenced (Trans. page 57). She was spoken by two vessels bound south. The Cockaponset was bound north. Of course if a south bound vessel had turned around and performed the work the award would have had to have been much

higher. We will not state the areograms in this brief, but respectfully call the court's attention to the same as printed on pages 94 to 101 of Transcript.

We also call the court's attention to the testimony.

I.

ARGUMENT.

On pages 30 and 31 of Transcript we find the weather probabilities for the region where the City of Omaha was picked up, as given by the United States Hydrographic Office. Those probabilities are for all years, and not for the single year the Colima was lost. In the case of

The Colima, 82 Fed. 665,

it appears that that vessel encountered one of the storms mentioned three days earlier in the year and was lost with large loss of life. Of course the question in this case is, Is the award of two months' pay fair, or was it an abuse of discretion to award that amount?

The United States cites cases in its brief. Under either of them the award in this case is low. We will first take the case of

The Melderkin, 249 Fed. 776.

Of course it will be remembered that in September, 1915, when the service was performed in that case, the purchasing power of money was much

higher than in 1920, when the services in this case were performed, and the award of $45,000.00 would be much larger than a corresponding amount in 1920—probably about double—but the Melderkin does not seem to have been in a much worse way than the City of Omaha—not as bad in fact, as she had steam, could steer by steam and light by steam.

The values in that case were $1,450,000.00.

The distance towed was in knots 890.

The distance towed was less in knots by knots 66.

And the values were but 55.6% of the values here. Without allowing for the difference in the purchasing power of money, or the distance towed, or the difficulty in towing, on the same basis of the total award in that case, the award in this case should have been a total of $64,980.00. And on a basis of 25% to the crew the award should be $16,245.00.

The same figures apply to the case of

The Varzin, 180 Fed. 892.

We fail to see where the United States is hurt in this case.

In all the other cases cited in appellant's brief, the values were small, the distance short. In the case of

The Wellington, 52 Fed. 605,

the values were $100,000.00. However, the court gave each seaman $100.00. At that time the wages of seamen were $40.00 per month, so they received two and one-half months' pay on a valuation of $100,000.00. The task in this case was almost as

difficult. It was just as difficult except for the weather.

In the case of

The Avalon, 255 Fed. 854,

this court increased the award from $2000.00 to $5000.00. The values were $481,000.00, the distance towed does not appear but the towing occupied 18 hours. On the same ratio, the award in this case should be about $75,000.00.

In the case of

The Kanawha, 234 Fed. 762,

the vessel was towed about the same length of time. The City of Omaha was towed possibly a few hours longer, the values were a total of ship and cargo, $537,858.34. The award was $34,600.00.

On the same ratio the total award in this case should be about $297,900.00 and the award to the crew 25% of that or $51,975.00.

We respectfully submit that the award in this case is low rather than high.

II.

THE UNITED STATES IS LIABLE FOR THE CARGO'S SHARE OF THE SALVAGE.

Counsel states on page 20 of brief, as follows:

> "Her cargo was not owned by the United States, and should not be taken into consideration in the present libel".

The United States has blown hot and cold in this case. In the lower court it obtained an amendment to the decree upon the ground that the United States was liable for all the salvage and a decree could not run against the cargo (Trans. pages 68-69).

The law is as follows:

Sec. 3, of the Act of March 9th, 1920:

> "* * * If the libelant so elects in his libel the suit may proceed in accordance with the principles in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder." * * *

Sec. 8.

> "That any final judgment rendered in any suit herein authorized and any final judgment within the purview of Sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of Section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor: otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay such judgment or award or settlement".

For further argument upon this subject we refer to brief in United States v. Miles et al., argued orally in this case.

Section 2 expressly states that a libel *in personam* may be brought against the United States, it reading in part:

> "a libel *in personam* may be brought against the United States".

In conclusion we beg to state that the salvage service in this case was performed May, 1920. A cursory analysis of the authorities cited in appellant's brief, that we have not commented on, shows the award low rather than high, and it seems that the delay in this and the case of The United States v. Otis E. Miles et al. will tend to discourage, rather than procure, salvage services at sea. The decree in this and the Miles case was signed March 1st, 1921, and no good reason appears for the failure to have the appeals on the May calendar of this court.

We respectfully submit that the award should be increased, with interest and costs.

Dated, San Francisco,
October 19, 1921.

H. W. Hutton,
Proctor for Appellees.